United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1320

To be argued by
T. BARRY KINGHAM

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1320

UNITED STATES OF AMERICA,

Appellee,

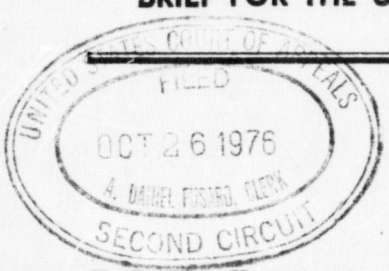
—v.—

KINGSLEY ROTARDIER, and
JUAN MACDOUGAL-PENA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 2

ARGUMENT:

POINT I—Venue for trial of the conspiracy count was properly laid in the Southern District of New York, and, in any event, the defendants waived any defect in the indictment or proof in this regard 6

POINT II—The evidence was more than sufficient to support Pena's conviction 10

POINT III—The District Court's instructions to the jury were correct 16

A. The trial court was not required, *sua sponte*, to give a *Garguilo* instruction 16

B. The District Court properly instructed the jury on the inference to be drawn from possession of recently stolen property 19

CONCLUSION 20

TABLE OF CASES

Barnes v. *United States*, 412 U.S. 837 (1973) 19

Bollenbach v. *United States*, 326 U.S. 607 (1946) .. 8

Hyde v. *United States*, 225 U.S. 347 (1911) 9

Pinkerton v. *United States*, 328 U.S. 640 (1946) .. 17, 10

PAGE

United States v. *Barrera*, 486 F.2d 333 (2d Cir. 1973) 15

United States v. *Cardillo*, 316 F.2d 606 (2d Cir. 1963) 7, 8

United States v. *Cirillo*, 499 F.2d 872 (2d Cir. 1974) 10, 15

United States v. *Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied sub nom. Duboff* v. *United States*, 423 U.S. 926 (1975) 8

United States v. *Erb*, Dkt. No. 76-1143, slip op. at 64 (2d Cir., Oct. 1, 1976) 19

United States v. *Fassoulis*, 445 F.2d 13 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971) 8, 9

United States v. *Frank*, 494 F.2d 145 (2d Cir. 1974) 14

United States v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962) 16, 17

United States v. *Goldberg*, 527 F.2d 165 (2d Cir. 1975) 20

United States v. *Gross*, 276 F.2d 819 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960) 9

United States v. *Indiviglio* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966) 20

United States v. *Johnson*, 513 F.2d 819 (2d Cir. 1975) 14, 15

United States v. *Lubrano*, 529 F.2d 633 (2d Cir. 1975) 15

United States v. *Morgan*, 394 F.2d 973 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968) 7

PAGE

United States v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) 15

United States v. *Pinto*, 503 F.2d 718 (2d Cir. 1974) 20

United States v. *Rivera*, 388 F.2d 545 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968) 9

United States v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974) 15

United States v. *Santiago*, 528 F.2d 1130 (2d Cir. 1976), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976) 20

United States v. *Schwartz*, Dkt. 75-1364, slip. op 3277 (2d Cir., April 20, 1976) 8

United States v. *Terrell*, 474 F.2d 872 (2d Cir. 1973) 18

United States v. *Turley*, 135 F.2d 867 (2d Cir.), *cert. denied*, 320 U.S. 745 (1943) 8

STATUTES CITED

Fed. R. Crim. P., Rule 30 20

Title 18, United States Code, Section 371 2

Title 18, United States Code, Section 2314 ..... 9, 7, 1

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1320

UNITED STATES OF AMERICA,

Appellee,

—v.—

KINGSLEY ROTARDIER, and JUAN MACDOUGAL-PENA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Kingsley Rotardier and Juan MacDougal-Pena appeal from judgments of conviction entered on June 30, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 76 Cr. 481, filed May 14, 1976,* charged Rotardier and Pena with conspiring to violate Title 18,

* This indictment superseded Indictment 74 Cr. 824, filed August 23, 1974. The trial of that indictment ended on January 6, 1975 with a mistrial when the jury was unable to agree on a unanimous verdict. With the defendants' consent, their retrial awaited disposition of homicide charges against them in Supreme Court, New York County. They were acquitted in that case on March 3, 1976, and returned to federal custody for the instant trial.

United States Code, Section 2314 by transporting stolen securities, coins and other property from the US Virgin Islands to New York City, in violation of Title 18, United States Code, Section 371. They were also charged in two substantive counts with the interstate transportation of stolen securities and coins of a value in excess of $5,000, in violation of Title 18, United States Code, Section 2314.

Trial began on May 18, 1976 and ended on May 20, 1976, after three hours of deliberation, with the conviction of both defendants on all counts.

On June 30, 1976, Rotardier and Pena were each sentenced to concurrent three year terms of imprisonment on each count. Both defendants are presently serving their sentences.

Statement of Facts

Between April 8, 1974 and July 10, 1974, the defendant Rotardier, using the alias "Div Riveault," and the defendant Pena, alias "Dominic," lived in the first-floor apartment of a house in St. Croix, Virgin Islands. Mrs. Caroline Swift lived on the upper floor of the house, called Hill Villa, which she owned together with other properties in St. Croix. (Tr. 116). In early April, 1974, Mrs. Swift had leased the downstairs apartment to "Div Riveault" (Rotardier) who moved into the premises with three otner men, including "Dominic" (Pena). (Tr. 117-19).

About a month after the men moved in, a secure fire-proof filing cabinet was delivered to Mrs. Swift at Hill Villa. (Tr. 121). While someone was in the defendants' downstairs apartment, workmen struggled to get the cabinet into Mrs. Swift's second floor quarters. (Tr. 159).

Then Viola Westerman, Mrs. Swift's housekeeper, went to a bank safe-deposit box and removed certain securities and valuable papers which Mrs. Swift wished to keep at the house. (Tr. 161). Together the women filled the filing cabinet with securities, paperweights and an extensive gold and silver coin collection, and then Mrs. Swift locked it. (Tr. 122-29). Mrs. Swift also placed coins and paperweights in a disguished safe at the Chalet, a beachhouse which she owned and which Rotardier had considered leasing. On May 9, 1974, Mrs. Swift left for a trip to the United States. (Tr. 131-32).

On July 10, 1974, Viola Westerman discovered that both of Mrs. Swift's homes had been burglarized and that thousands of dollars worth of securities, rare coins, paperweights and other *objets d'art* had been stolen from the locked filing cabinet at Hill Villa and from the safe at the Chalet. (Tr. 139, 170-74).* When Viola Westerman discovered the burglaries on July 10, 1974, she notified both Mrs. Swift and the police, who came to Hill Villa. (Tr. 171-73). When the police arrived the defendants Rotardier and Pena were outside the house next to a Volkswagen van owned by one Vivian Bennerson. (Tr. 175). The two men entered the van, it left, and Rotardier and Pena were not seen again in St. Croix. (*Id.*).

They did appear, however, in the late afternoon of the very next day at Hayden, Stone, Inc., a New York City brokerage house, with the securities stolen from Mrs. Swift's house. (Tr. 39, 52).

---

* As recently as the Spring of 1976, Mrs. Westerman discovered the remnants of the burglary in Rotardier and Pena's apartment at Hill Villa, including charred coin collection books and empty coin bags. (Tr. 181-82).

At Hayden, Stone, Rotardier, using the false name "Steven Hyde-Swift",* and Pena, who was not introduced by name, met Arthur Sherman, manager of the Park Avenue branch of the brokerage house. Rotardier and Pena were dressed in white outfits with Panama hats and sandals, and were accompanied by Harvey Bernstein, who was known to one of the employees of the Hayden, Stone branch. (Tr. 40-41). Although Pena did not take part in the conversation, he was present while Rotardier, representing himself to be Mr. Swift, and Bernstein opened a joint brokerage account by pledging as collateral against future trades more than $35,000 of the stolen securities, all in the name of *Stephen* Swift. (Tr. 42-52; GX 7-20). Hayden, Stone would not accept the other stocks, which were in the names of Caroline Swift or the Arthur M. Hyde Foundation. (Tr. 53).

In order to open the account, Rotardier, in Pena's presence, signed the name "Swift" to the necessary documents, and produced a New Jersey driver's license in the name "*Steven* Swift." (Tr. 42-52; GX 21). Rotardier also claimed that he had a brokerage account at Bache & Co. in Puerto Rico and that he was employed by the Arthur M. Hyde Foundation on Park Avenue in New York (Tr. 58-60). Sherman's subsequent investigation showed that the real *Stephen* Swift, Caroline Swift's son, a white male, was at college in Utah, while Rotardier, a black male, obviously did not fit that description. (Tr. 58).

While Sherman was trying to verify the false information furnished by Rotardier, the defendants were busy disposing of a large quantity of coins. During the week prior to July 16th, Rotardier and two other men, all

---

* Stephen Swift was the name of Mrs. Caroline Swift's son. A portion of the stolen securities were registered in his name.

dressed in off-white tropical suits, went to Harmer Rooke Numismatics, Ltd., a coin dealership in Manhattan. There one of the men told Richard Genot, vice president of the concern, that they had a large collection of coins which they were having difficulty transporting from the Caribbean. (Tr. 81). The men left after Genot could not quote a price based on only a sample of the collection. (Tr. 81). Then, on July 16, 1974, one of the men called, identified himself as the man who had previously been in from the Caribbean and said they were at the airport. The caller asked whether Genot would be interested in purchasing the coins, and the dealer quoted a price. Later that day the same three men came to Harmer Rooke with three large heavy wooden crates of coins, including dimes, quarters, half dollars, rare Morgan and Peace silver dollars and some Canadian silver dollars. (Tr. 85). In return for the collection, which fit the description of the coins stolen from Mrs. Swift's houses (Tr. 85-87, 139-40), Genot issued a check to one of the men in the amount of $23,719.20. (Tr. 87; GX 23). The payee of the check was "Kingsley Rotardier." Genot also entered that name and the address "Warwick Hotel, Room 1403" on the firm's copy of the receipt. (Tr. 83; GX 22). The Harmer Rooke check was later cashed at the Chase Manhattan Bank by a man who showed identification in the name "Kingsley Rotardier," using the address "356 East 8th Street, NYC," (Tr. 94; GX 23).

During the period from July 15th through 19th, Rotardier, using the name "Wainwright", lived at the Warwick Hotel (Tr. 97; GX 24), and was driven around New York in a liveried sedan for which he paid with hundred dollar bills. (Tr. 96-98). He stayed with another person also named "Wainwright" at the hotel, and both used a fictitious address in Texas. (GX 24). During the limousine trips, Rotardier was accompanied by two

fair-complected * men who, like himself, wore tropical suits, Panama hats, sunshades and casual shoes. (Tr. 97).

On August 8, 1974, the defendants Rotardier and Pena were arrested at the office of Hayden, Stone, as a result of a call from Mr. Sherman. (Tr. 109). Neither carried identification in his true name. Rotardier had two New Jersey driver's licenses: one in the name Steven Hyde-Swift; the other in the name "Noel Wainwright *Winall*." (Tr. 111; GX 21-25). He also had a New York City birth certificate in the same name. (GX 26). Pena likewise carried only phony identification documents: a New Jerseys' driver's license and a New York City birth certificate, both in the name "Joseph Hodge *Winall*." (Tr. 112; GX 27, 28).

The defendants presented no evidence at trial.

ARGUMENT

POINT I

Venue for trial of the conspiracy count was properly laid in the Southern District of New York, and, in any event, the defendants waived any defect in the indictment or proof in this regard.

Defendant Rotardier claims that there was no proof of overt acts committed in the Southern District of New York in furtherance of the conspiracy charged in Count One of the indictment and that therefore his conviction on that count should be reversed. His argument is without merit because there was such proof and because, in

---

* The jury could find from Pena's appearance at trial that he was fair-complected. The jury also knew that, while at Hayden, Stone, Pena had worn a white suit, Panama hat and sandals.

any event, he waived any objection to venue by failing to raise the issue in the District Court.*

Overt Acts Three and Four of Count One alleged that in furtherance of their conspiracy to transport stolen property in interstate commerce the defendants delivered the stolen securities and coins to a brokerage house and numismatist, respectively. The evidence established that both acts occurred in the Southern District of New York. Rotardier claims that the conspiracy ended prior to these events, when the stolen goods first arrived in the New York area. Thus, he argues, the evidence is insufficient to establish that an overt act in furtherance of the conspiracy occurred in the Southern District of New York.

Rotardier's narrow view of the requirements of proof of Section 2314—or a conspiracy to violate that section—is incorrect. Simply put, the conspiracy alleged in the indictment obviously contemplated the disposition of the securities and coins to unsuspecting parties in New York City. Under those circumstances, the conspiracy and acts committed in furtherance of it continue until the goods reach the innocent receiver. *United States* v. *Cardillo*, 316 F.2d 606, 614 (2d Cir. 1963). *Cf. United States* v. *Morgan*, 394 F.2d 973, 977 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968). Here, the evidence established the defendants' possession and dealing in stolen property in New York within a day of the discovery of its disappearance from the Virgin Islands. Proof of those activities, which unquestionably occurred in the Southern District of New York, was proof of acts com-

---

* Pena has joined his co-defendant's argument on this issue. (Brief at 23).

mitted by the defendants in furtherance of their conspiracy. *United States* v. *Cardillo, supra.**

Even if Rotardier is correct in his allegation that the overt acts charged in the indictment did not occur in the Southern District of New York, the prosecution is not limited in its proof to only those overt acts listed in the indictment. Thus, the defendants' conviction for conspiracy may be sustained upon proof of overt acts not so alleged. *United States* v. *Schwartz*, Dkt. 75-1364, slip op. 3277, 3284 (2d Cir., April 20, 1976); *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir.), *cert. denied sub nom. Duboff* v. *United States*, 423 U.S. 926 (1975); *United States* v. *Fassoulis*, 445 F.2d 13, 18-19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971), and cases cited therein. By proving that the defendants were in possession of stolen property in New York City within a day of their departure from the Virgin Islands, the Government established that they had *arrived* in the Southern District of New York in furtherance of their conspiracy to transport the stolen property.** Proof of their arrival was evidence of the transportation of the goods to the Southern District, their ultimate destination. Indeed, the defendants' convictions of Counts Two

---

* While *Bollenbach* v. *United States*, 326 U.S. 607 (1946) at first blush may appear to support the defendant's position here, it is important to recognize that Bollenbach was *not* a transporter, but merely a "fence" in New York. *Id.*, at 610. However, his co-defendants had transported the stolen property and their activities in New York were obviously in furtherance of their conspiracy. *United States* v. *Turley*, 135 F.2d 867, 869 (2d Cir.), *cert. denied*, 320 U.S. 745 (1943).

** Overt Act Two alleged that the defendants had flown from St. Croix to New York, New York. While they must have landed at an airport in the Eastern District, the stolen property cannot reasonably be viewed to have come to a halt until it later arrived in the Southern District in furtherance of the conspiracy.

and Three, the substantive transportation counts, encompassed a finding by the jury that they had, in fact, transported the securities and coins to New York City. Such proof was more than sufficient to establish the commission of an overt act—arrival—in furtherance of the conspiracy. *United States* v. *Fassoulis, supra.*

Finally, even assuming *arguendo* Rotardier were to prevail on the points addressed above, he is still entitled to no relief. The necessity for proof of an agreement or overt act in the district of trial is merely a requirement of venue. *Hyde* v. *United States*, 225 U.S. 347, 359 (1911). Even if no agreement or overt act in furtherance of a conspiracy to violate Section 2314 were proved to have occurred in the Southern District of New York, at best the defendant might claim that venue was improperly laid in that district. However, Rotardier's challenge to the venue of his trial comes too late. No objection was made below, either to the face of the indictment or as part of the motions for a judgment of acquittal. (Tr. 210, 214-15). See *United States* v. *Gross*, 276 F.2d 819 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960). Thus, Rotardier's ultimate claim on this point—lack of venue—must be rejected because of his failure to object at any time on that ground in the District Court. *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968).

POINT II

The evidence was more than sufficient to support Pena's conviction.

Defendant Pena claims that there was insufficient evidence to prove beyond a reasonable doubt that he was guilty of conspiring with Rotardier to transport in interstate commerce the securities and coins which were stolen from Caroline Swift's houses. While Kingsley Rotardier may have been the prime actor in the commission of these crimes, the circumstantial evidence is more than ample to sustain Pena's conviction as a co-conspirator, and also his conviction for the substantive offenses under the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946).*

To support this claim, Pena offers a selective view of the evidence below, together with a recitation of legal principles with which the Government does not disagree. Simply put, however, there is sufficient evidence for inferring that Pena "know about the enterprise and intended to participate in it or make it succeed." *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir. 1974).

There is substantial evidence of Pena's involvement at the St. Croix end of Rotardier's caper. Using the false name "Dominic", Pena moved into the first floor

---

* Rotardier claims that if Pena succeeds on this point, his own conviction for conspiracy must fall for lack of the requisite plurality. (Brief at 8). That argument lacks merit because even if Pena was not a co-conspirator, the evidence showed that Rotardier was assisted by at least two persons in his transportation of the stolen property, and considering the size and bulk of the coin shipment it is inconceivable that Rotardier transported it alone. Thus, the evidence is sufficient to sustain *his* conspiracy conviction in any event.

apartment at Hill Villa with Rotardier and two other men (one of them Pena's brother) in early April 1974. (Tr. 117-19). Shortly thereafter, Rotardier also examined Mrs. Swift's beach house, Chalet, which he considered renting as well (Tr. 147), and where Mrs. Swift had hidden coins and jewelry. (Tr. 131). Then, a couple of days before her departure for the United States on May 9th, Mrs. Swift obtained a heavy filing cabinet in which to place her valuables at Hill Villa. (Tr. 121-22). Someone was present in Pena's quarters at the time the commotion was made trying to move the cabinet to Mrs. Swift's second floor apartment (Tr. 159), and after Mrs. Swift left St. Croix, her helper Viola Westerman saw Pena virtually every day at Hill Villa.

Rotardier could not have concealed the burglaries of Mrs. Swift's homes by himself, and there is no question that Pena lived with Rotardier at Hill Villa at the time of the thefts. From the evidence found there—discarded coin books, a silver platter which had earlier been secreted in Mrs. Swift's upstairs apartment (Tr. 179), and several plastic coin containers—, the jury could find that the apartment in which Pena resided with Rotardier was the respository of a large quantity of stolen merchandise, including more than 10,000 coins, at the time he was living there. The likelihood of Pena's ignorance of the burglaries under those circumstances is extremely remote.

The next facet of Pena's actions supporting the jury's conclusion of his knowing participation as a conspirator in his precipitate departure from St. Croix on July 10, 1974, the very day the police came to Hill Villa to investigate the burglaries. Viola Westerman saw Rotardier carrying a briefcase, and saw Pena enter the rear of the van in which they both obviously drove off. (Tr. 175). Neither Rotardier nor Pena informed her they were leav-

ing the island, though she was the caretaker and rent-collector. Pena suggests that it is "possible" he left only to accompany Rotardier who simply departed to avoid eviction. (Brief at 15). Of course, anything *is* "possible", but the circumstances surrounding Pena's departure on the day of the discovery of the missing property are simply too coincidental to require recognition of his suggested possibility. Rather, the clear inference which the jury quite plainly drew was that Pena left St. Croix with Rotardier in order to escape apprehension for a burglary of which they would both obviously be suspected.*

Most damaging of all for Pena is his appearance the next day, dressed in white suit and Panama hat, with Rotardier in the offices of Hayden, Stone in New York City. Pena's sudden departure with Rotardier from the Virgin Islands, and their arrival the next day at a place over a thousand miles away certainly suggests that they had travelled a long distance together, with a common purpose. Their appearance at the brokerage house, together with the stolen securities, and Rotardier's false representation of himself as Mrs. Swift's son, Stephen Swift, in Pena's presence, point inescapably to Pena's involvement in the transportation of the stolen property. After all, it is one thing to propose an innocent explanation for a defendant's mere presence at the scene of a crime; it is quite another to expect a jury to believe that a defendant would be at the scene of a theft on one day and over a thousand miles away at the scene of the disposition of the stolen property on the very next day without having any stake in the illicit venture.

---

* The fact that the two other occupants of the apartment remained for two more days adds nothing to his contrary claim, for they, too, disappeared after that short period. (Tr. 196, 199).

While admittedly there was no direct evidence that Pena was one of the men who delivered the stolen coins to Harmer Rooke, or was one of the men with Rotardier in the limousine, or was the person who lived with Rotardier at the Warwick Hotel, there was clearly sufficient circumstantial evidence from which the jury could conclude that Pena was one of the men who assisted Rotardier in the disposition of the stolen coins. The description of Pena's and Rotardier's dress given by Arthur Sherman of Hayden, Stone, closely fit that of the men who transported the stolen coins to Harmer Rooke and who rode in the limousine and stayed at the Warwick Hotel. Interestingly, the hotel register bears the names "Wainwright" for two occupants who gave a fictitious Texas address. (GX 24). One of the men was Rotardier, who was known by the "Wainwright" to Bobby Banks, the limousine driver. (Tr. 96).

In addition, at the time of his arrest on August 8th Pena carried no identification in his true name, but only false documents in the name "Joseph Hodge Winall." (Tr. 112). By itself this evidence might seem insignificant, but it is highly relevant when considered with similar documents found in Rotardier's possession, which bore the name "Noel Wainright Winall." (Tr. 110, 111).* With both Pena and Rotardier masquerding as "Winalls" and the common use of the name "Wainright" in two of Rotardier's aliases, it is unlikely that Pena's use of pseudonyms was anything but an attempt to conceal his true identity in connection with his and Rotardier's criminal activity. Thus, while the fact that Pena carried false identification is not by itself indicative of an attempt to avoid detection for interstate transportation of stolen

---

* Even a cursory examination by a layman of the false birth certificates reveals the common handwriting of the name "Winall", in documents supposedly emanating from separate offices in the Bronx and Brooklyn. (GX 26, 28).

property, when considered with the other evidence of his knowing criminal participation, the conclusion of culpability is compelling.

The key to determining the sufficiency of the evidence against Pena is a finding by this Court that he engaged in "purposeful behavior" in furtherance of the conspiracy or to aid and abet Rotardier. *United States* v. *Johnson*, 513 F.2d 819, 823 (2d Cir. 1975). Here there was sufficient evidence from which the jury could so find, not only from Pena's presence at every turn, but indeed from the circumstantial proof of several purposeful acts: storage and concealment of the stolen property at Pena's residence at Hill Villa; his assistance of Rotardier's getaway on July 10th by loading and riding in the van leaving Hill Villa; and by his actions in New York after arrival with the stolen property.

Pena's suggestion that the evidence established at best his mere presence plus possible tardy knowledge that the goods were stolen, strains credulity. While the *direct* evidence did not establish Pena's possession or transportation of the stolen securities, his presence at the scene of the burglaries and indeed his living at the storage site for the fruits of those crimes, together with his presence in New York the day after discovery of the loss are compelling indications of his stake in the venture. Moreover, it is significant that Pena's presence in St. Croix, his disappearance from the island without prior notice and his association with Rotardier in New York were totally unexplained at trial. Although Pena enjoyed a right not to testify, his failure to offer any innocent explanation for his conduct certainly buttressed the Government's case. As Judge Friendly observed in *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir. 1974):

> "[T]he self-incrimination clause does not elevate a defendant's silence, much less the failure to

> present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."

See also *United States* v. *Parness*, 503 F.2d 430, 437 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Here, where there was no exculpatory version offered by either defendant, the jury was entitled to draw the inferences of knowledge, purposeful action and stake in the venture from Pena's highly suspicious continued presence and activities with Rotardier.

In cases such as this, in which the Government must rely upon circumstantial evidence to establish guilt at trial, this Court has recognized that the facts of each are *sui generies*. *United States* v. *Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975). Thus, although Pena seeks support from cases such as *United States* v. *Cirillo*, *supra*, and *United States* v. *Johnson*, *supra*, he plainly ignores the holdings in *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974), and *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), in which this Court sustained, after an attack for insufficiency, convictions based on evidence very similar to that in this case. Taking the evidence in the light most favorable to the Government, there was sufficient circumstantial evidence from which the jury could conclude beyond a reasonable doubt that stolen goods were stored in Pena's apartment and transported to New York, and that by his presence at the scene of the crime, and by his actions, Pena lent his support to the object of the conspiracy and established his stake in the outcome. See *United States* v. *Rizzuto*, *supra*, 504 F.2d at 421.

POINT III

The District Court's instructions to the jury were correct.

A. The trial court was not required, *sua sponte*, to give a *Garguilo* instruction.

Pena seeks a new trial because Judge Bonsal did not instruct the trial jurors that proof of mere presence coupled with guilty knowledge would be insufficient for conviction unless the Government also proved that Pena was a participant rather than just a knowing spectator. *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962). He argues that even though no request for the instruction was made, the failure to give it rises to the level of plain error which affected Pena's substantial rights. This claim is meritless.

Pena contends that the jury was free to conclude that he was guilty because he was often in Rotardier's company and because at the time of the disposition of the securities he knew of their theft. (Brief at 20, 21). Considering the other evidence in the case, the summation of Pena's counsel and the Court's charge as a whole, however, the likelihood of the jury's reaching that conclusion was remote.

First, Pena's counsel argued to the jury that even if the Government proved Pena's presence with Rotardier, and even if his knowledge had been proved, there was still not enough evidence of his participation. (Tr. 247, 251). Then Judge Bonsal instructed the jury in connection with the conspiracy count that the fact that the defendants had known each other or had associated with one another would not be enough to prove them conspirators. (Tr. 277). Continuing, the Court charged

that in order to prove that a defendant had participated in the conspiracy, the Government had to establish beyond a reasonable doubt that the defendant joined it knowingly and wilfully, knowing that its unlawful purpose was to transport stolen property to New York.

With respect to the substantive counts of transportation, the Court first charged the elements of the offense. (Tr. 282-285). Then, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the Court instructed that if the defendant in question were found to be a member of the conspiracy, the jury was entitled to find that he had aided and abetted the transportation of the stolen property. (Tr. 285). In the alternative, Judge Bonsal charged that if the defendant were not found to be a conspirator, in order to establish guilt of the substantive counts the Government would have to establish beyond a reasonable doubt "that the defendant knowingly assisted and aided in the transportation of the securities, knowing that they were stolen, that he had a financial or other stake in its outcome." (Tr. 286).

Pena claims that despite these clear instructions there was prejudice because the jury was likely to convict him on a "mere presence even with knowledge" theory. However, in light of the specific instructions discussed above, there was no plain error here. The thrust of the prosecution as to Pena was that Rotardier had not acted alone and that the jury could properly infer from the evidence discussed in Point II, *supra*, that Pena was one of Rotardier's confederates and that Pena had knowingly joined the conspiracy and actively assisted Rotardier's substantive crimes.

This is not the situation which this Court addressed in *United States* v. *Garguilo*, *supra*, upon which Pena relies so heavily. There, Judge Friendly expressed the

Court's fear that the trial judge, "quite unwittingly and simply by emphasis may have led the jury to believe that a finding of presence and knowledge by Macchia was enough for conviction." 310 F.2d at 254. The trial court's factual application of the standard aiding and abetting instruction had focused merely on Macchia's awareness of his co-defendant's activity, and not on purposeful acts committed by Macchia himself. 310 F.2d at 254, n.1. There was no conspiracy instruction in *Garguilo* as there was in this case, and during its deliberations the jury indicated concern over the aiding and abetting aspect of the instructions. This Court found that the trial court's response to the jury's request for clarification was not sufficiently concrete, and remanded Macchia's conviction for a new trial in light of the "exceptional circumstances" just discussed. *Id.* Those circumstances did not exist in the present case, particularly in view of Judge Bonsal's careful instructions with respect to the requirements of knowledge and purposeful activity under the conspiracy count.*

Thus, although the evidence of Pena's criminality was not as overwhelming as it was with respect to Rotardier, Judge Bonsal's instructions were more than sufficient to prevent the prejudice which Pena proposes occurred here. In light of the inferences of his active participation, coupled with Judge Bonsal's clear conspiracy and aiding and abetting instructions, the failure

---

* *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973) is also unavailing to Pena here. In *Terrell*, when a conspiracy charge was included, defense counsel specifically requested a *Garguilo* charge which was denied. Under those circumstances, not present here, this Court remanded the conviction of the defendant McDonald. The failure to give the charge as to co-defendants Green and Hillard was held not to be plain error. *Id.* at 876, n.2

to give the unrequested *Garguilo* instruction was not plain error.*

B. The District Court properly instructed the jury on the inference to be drawn from possession of recently stolen property.

In connection with the element of knowledge in the substantive counts, Judge Bonsal properly instructed the jury that it might infer a defendant's knowledge that the securities and coins had been stolen from proof of that defendant's possession of the recently stolen property. (Tr. 285). See *Barnes* v. *United States*, 412 U.S. 837 (1973). Although his counsel did not object to this instruction below, Pena now claims that it was reversible error because there was no evidence that he had personally possessed the stolen property.

This contention is inaccurate, because there was abundant circumstantial evidence that Pena was one of the men who assisted Rotardier in bringing the load of stolen securities and coins from the airport to the brokerage house and numismatist. Morever, from the Court's instructions it was clear that before they would be permitted to draw the inference, the jury had to find that the defendant in question possessed the stolen property within a recent time after the theft. From all of the evidence the jury was entitled to infer that Pena had done so, and thus the instruction was correct.

However, even if the instruction could properly be applied only to Rotardier, Pena's counsel did not object to its

---

* While it may be the better practice to give such an instruction, see *United States* v. *Erb*, Dkt. No. 76-1143, slip op. at 64, (2d Cir. Oct. 1, 1976), the point here is that Pena was not prejudiced by its omission.

application to his client, and thus any right to appeal this issue has been waived. Rule 30, Fed. R. Crim. P.; *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976); *United States* v. *Goldberg*, 527 F.2d 165, (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—727

1071

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. BARRY KINGHAM being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of October, 1976, he served ~~a copy~~ two copies each of the within brief by placing the same in a properly postpaid franked envelope addressed:

Paul B. Bergman, Esq.
25 Broadway
New York, NY 10004

Sheila Ginsberg, Esq.
Federal Defender Services Unit
Legal Aid Society
Room 509
United States Courthouse
Foley Square
New York, NY 10007

And deponent further says that he sealed the said envelopes and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

T. Barry Kingham

Sworn to before me this
26th day of October, 1976
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978